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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 499

MEMPHIS NATURAL GAS COMPANY,
Appellant,

vs.

ROY H. BEELER, ATTORNEY GENERAL OF THE STATE OF TENNESSEE.

APPEAL FROM THE SUPREME COURT OF THE STATE OF TENNESSEE.

STATEMENT AS TO JURISDICTION.

WALTER P. ARMSTRONG,
T. A. MCEACHEM, JR.,
Counsel for Appellant.

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IN THE SUPREME COURT OF TENNESSEE

MEMPHIS NATURAL GAS COMPANY,

vs.

LEWIS S. POPE, ET AL.

JURISDICTIONAL STATEMENT REQUIRED BY RULE 12 OF THE SUPREME COURT OF THE UNITED STATES.

A.

The statutory provisions believed to sustain the jurisdiction of the Supreme Court of the United States in this case are Sections 237 and 237-A of the Judicial Code as amended by the Act of February 13, 1925, and the Act of January 31, 1928, as amended by the Act of April 26, 1928.

In the Supreme Court of Tennessee there was drawn in question the validity of statutes of the State of Tennessee, as construed and applied, on the ground of their being repugnant to the Constitution of the United States and the decision of the Supreme Court of Tennessee was in favor of the validity of said statutes.

B.

The statutes of the State of Tennessee, the validity of which is involved, are Sections 1316-1318 of the Official Code of Tennessee of 1932, and are as follows:

"Sec. 1316.—*Tax imposed.*—All corporations and joint stock associations organized under the laws of the State of Tennessee, other than those organized for general welfare and not for profit, and all corporations and joint stock associations organized under the laws of any other state or county for profit and doing business in Tennessee, shall, without exception, pay to the state comptroller annually an excise tax, in addition to all other taxes, equal to three per cent. of the net earnings for their preceding fiscal year of such corporations and joint stock associations, arising from business done wholly within the state, excluding earnings arising from interstate commerce. Tennessee insurance companies shall pay on net earnings proportioned to premiums on policies on persons and property in this state."

"Sec. 1317. *Credit for certain other taxes paid.*—Any corporation or joint stock association, paying the tax imposed, shall be entitled to a credit upon the tax imposed for the amount paid, in the preceding twelve months prior to July 1st of the year in which this tax becomes due, to the secretary of state under the terms of section 4136; insurance companies shall be entitled to a credit for all amounts so paid during the preceding twelve months under section 6 of the general revenue bill, and also under section 5716, and corporations or joint stock associations engaged in mercantile pursuits, and paying the merchants' privilege tax to the State of Tennessee shall be entitled to a credit for the amount so paid during such preceding twelve months; and all other corporations and joint stock associations shall be entitled to a credit upon the tax herein imposed for any amount paid to the state for such preceding twelve months under any general revenue bill, as a privilege tax, unless otherwise expressly provided in the statute imposing the priv-

ilege tax; provided, that the tax herein imposed is a state tax levied for state purposes only, and no county or municipality or taxing district shall have power to levy any like tax."

"Sec. 1318. *Due, when; penalty.*—The tax imposed shall be due and payable on July 1st of each succeeding year; and, if delinquent thirty days, shall be subject to a penalty of one per cent. per month, and, in addition, interest at the rate of six per cent. per annum from July 1st until paid."

The Memphis Natural Gas Company in the Supreme Court of Tennessee challenged the validity of these statutes on the ground that as construed and applied so as to impose an excise tax upon the net earnings of the Memphis Natural Gas Company derived from the transportation and sale by means of a pipe line of natural gas from the State of Louisiana to the State of Tennessee in continuous flow, they were violative of the interstate commerce clause of the Constitution of the United States, Article 1, Section 8, Clause 3 of that Constitution, in that they imposed a license or a privilege tax on interstate commerce, placed a burden on the privilege of carrying on interstate commerce, constituted an interference with, and obstruction of, and an attempted regulation of, interstate commerce and were a usurpation of the powers delegated to the Congress of the United States by said provision of the Constitution of the United States.

The Supreme Court of Tennessee, which is the court of last resort of that State, held that notwithstanding the fact that said statutes, as construed and applied, imposed an excise tax upon the earnings thus derived by appellant solely from interstate commerce, they were constitutional and not violative of Article 1, Section 8, Clause 3 of the Constitution of the United States, thus denying the Federal right and claim asserted by appellant under the Constitution of the United States.

C.

The judgment and decree sought to be appealed from was first rendered on May 17, 1941, by the Supreme Court of Tennessee. This decree was modified and corrected on May 27th, 1941. On June 7th, 1941, Memphis Natural Gas Company, appellant, filed in this cause in the Supreme Court of Tennessee a petition to rehear and reverse said decree and judgment. This petition to rehear was denied on June 28, 1941. The application for appeal is presented July 23, 1941.

D.

This cause was instituted by the filing in the Chancery Court of Davidson County, Tennessee of an original bill by the Memphis Natural Gas Company against Lewis S. Pope, Lawyer and Investigator, Walter Stokes (for whom was substituted by consent court order, George E. McCanless, his successor in office) Commissioner of Finance and Taxation of the State of Tennessee, and Roy H. Beeler, Attorney General of the State of Tennessee, the persons charged with the collection of the excise tax imposed by Sections 1316-1318 of the Official Code of Tennessee of 1932, hereinabove set out in full, seeking a permanent injunction against their seeking to collect from Memphis Natural Gas Company any excise tax on account of the net earnings of said Memphis Natural Gas Company derived from the sale of natural gas in interstate commerce, which natural gas was transported by Memphis Natural Gas Company, through pipe lines, from Louisiana to Tennessee, where it flowed into the pipe lines of the purchasers.

The original bill claimed that if such statutes were construed and applied to impose said tax upon these earnings of the Memphis Natural Gas Company, they violated ap-

pellant's right under the Constitution of the United States, and alleged in part as follows:

> "THE CONSTRUCTION OR APPLICATION OF SECTIONS 1316 TO 1318 OF THE TENNESSEE CODE OF 1932 SO AS TO EXACT FROM COMPLAINANT THE EXCISE TAX PROVIDED FOR BY THESE SECTIONS WOULD 'CONSTITUTE A VIOLATION OF COMPLAINANT'S RIGHTS AS GUARANTEED TO COMPLAINANT UNDER ARTICLE 1, SECTION 8, CLAUSE 3, OF THE CONSTITUTION OF THE UNITED STATES, IN THAT
>
> (a) Said proceedings and actions attempt to impose a license or privilege tax on interstate commerce.
>
> (b) Said proceedings and actions attempt to place a burden on the privilege of carrying on interstate commerce.
>
> (c) Said proceedings and actions constitute an interference with and obstruction of and an attempted regulation of interstate commerce.
>
> (d) Said actions and proceedings are an attempted usurpation of the powers delegated to the Congress of the United States by the Constitution of the United States.'"

The original bill alleged, and the proof showed, that Memphis Natural Gas Company was the owner and operator of an interstate gas pipe line extending from the gas fields near Monroe, Louisiana, through the States of Arkansas and Misssissippi and into Tennessee. Appellant purchased natural gas in Louisiana and through this pipe line transported it to Tennessee, where it flowed into the pipe line of the two purchasers, public utility companies, Memphis Power & Light Company and West Tennessee Power & Light Company, contracts for purchase of said gas having been entered into in the State of New York. The gas was withdrawn from appellant's pipe line and moved

in a continuous flow in to the distributing pipe lines of the two purchasing companies. At the time of the withdrawal and for the purpose of, and necessarily incident to, delivery of the natural gas, appellant measured the gas by meters and its pressure was reduced in order to make delivery practicable. Appellant did not own or operate any distribution facilities, any tanks, reservoirs or equipment used for the storage of gas in Tennessee. Nothing was extracted from it, and no other gas mixed with it.

Appellant neither owned nor operated any instrumentality which was, or could be, used in the local distribution of natural gas in the State of Tennessee and had no ownership or control of the natural gas delivered to the purchasing companies after it passed into their pipe lines.

The relationship between appellant and the purchasing companies was solely that of buyer and seller, the contract with the purchasing company, Memphis Power & Light Company, having in it a formula for the adjustment of prices to be paid in the future for gas, dependent upon future conditions. The excise taxes, collection of which was sought to be enjoined, were imposed entirely upon earnings of appellant derived exclusively from this interstate business. "Temporary injunction was issued and supersedeas denied by Chief Justice Green of the Supreme Court of Tennessee. Copy of the memorandum opinion of Chief Justice Green denying supersedeas is attached hereto." The Chancellor of the Chancery Court of Davidson County on final hearing held that Sections 1316-1318 of the Official Tennessee Code of 1932 did not operate to impose the excise tax upon these earnings of appellant, because the earnings did not arise from business done wholly within the State, but from interstate commerce. A copy of the opinion of the Chancellor is attached hereto.

The defendants in the Chancery Court appealed to the Supreme Court of Tennessee. In that court appellant in

its brief again asserted that if said statutes were construed so as to impose this excise tax upon earnings derived from business done as above set out, it was unconstitutional and in violation of Article 1, Section 8, Clause 3, of the Constitution of the United States, one of the headings of appellant's brief in the Supreme Court of Tennessee being:

> "THE CONSTRUCTION OR APPLICATION OF SECTIONS 1316 TO 1318 OF THE TENNESSEE CODE OF 1932 SO AS TO EXACT FROM COMPLAINANT THE EXCISE TAX PROVIDED FOR BY THESE SECTIONS WOULD 'CONSTITUTE A VIOLATION OF COMPLAINANT'S RIGHTS AS GUARANTEED TO COMPLAINANT UNDER ARTICLE 1, SECTION 8, CLAUSE 3, OF THE CONSTITUTION OF THE UNITED STATES IN THAT
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> (a) Said proceedings and actions attempt to impose a license or privilege tax on interstate commerce.
>
> (b) Said proceedings and actions attempt to place a burden on the privilege of carrying on interstate commerce.
>
> (c) Said proceedings and actions constitute an interference with and obstruction of and an attempted regulation of interstate commerce.
>
> (d) Said actions and proceedings are an attempted usurpation of the powers delegated to the Congress of the United States by the Constitution of the United States.'"

Said brief was further and in part as follows:

> "Our insistence now, however, is that any other construction or application of the statute would be a violation of complainant's constitutional rights and in conflict with Article 1, Section 8, Clause 3, of the Constitution of the United States, which confers upon Congress the power to regulate interstate commerce. Therefore, we here and now make that federal question, and it is our submission that any other construction or applica-

tion of the statute to the transactions here involved different from that made by the Chancellor would immediately bring the statute as so construed and applied in conflict with the commerce clause of the Federal Constitution.

In this connection we point out that the cases which we have already cited and quoted from not only hold that similar transactions there involved were interstate commerce, but were interstate commerce of such nature as to be immune to the tax there involved under Article 1, Section 8, Clause 3, of the Constitution of the United States.

Therefore, again we cite these cases in support of our contention that not only are complainant's earnings exempt from the excise tax provided for by sections 1316 and 1318, Tennessee Code of 1932, but that they are protected from any such tax by that provision of the Federal Constitution.

Our insistence is that not only has the state expressly refrained from taxing interstate commerce, but that it does not possess the power to impose a tax upon the business in which the complainant was engaged in the years 1932 to 1935, and that if either this statute or any other statute had taxed the business of complainant during those years, as is now attempted to tax it, such a statute and its application would have been unconstitutional.

State Tax Commission *v.* Interstate Natural Gas Company, 284 U. S. 41, 76 L. ed. 156, Paper Book p. 2;

Pennsylvania *v.* West Virginia, 262 U. S. 553, 67 L. ed. 1117 (1923);

Missouri, ex rel., Barrett *v.* Kansas Natural Gas Company, 265 U. S. 298, 68 L. ed. 1027 (1924), Paper Book p. 10;

Public Utilities Commission *v.* Landon, 249 U. S. 236, 63 L. ed. 577 (1919);

Eureka Pipe Line Company *v.* Hallanan, 257 U. S. 265, 66 L. ed. 227 (1921), Paper Book p. 13;

East Ohio Gas Co. v. Tax Commission, 283 U. S. 465, 75 L. ed. 1171 (1931), Paper Book p. 19.

> But we do not elaborate upon this argument because of the full quotations already made from the cases and because we believe we are clearly entitled to prevail under the express terms of the Tennessee statute. But, we earnestly make the insistence because we want it distinctly to appear that this right so claimed under the Federal Constitution is strongly insisted upon."

The Supreme Court of Tennessee reversed the Chancery Court of Davidson County and construed Sections 1316-1318 of the Official Tennessee Code of 1932 as imposing an excise tax upon the earnings of appellant derived wholly from the sale and transportation of gas as above set out, and held that the Acts so construed did not violate Article 1, Section 8, Clause 3, of the Constitution of the United States. The majority opinion of the Supreme Court of Tennessee, delivered by Mr. Justice Fancher, a special judge, was filed May 17, 1941, and a copy of this opinion is attached hereto. Judgment in accordance with this opinion was rendered on the same date.

In the majority opinion the Court said:

> "We are justified in holding that though the gas has come into Tennessee in a movement that is interstate in character, yet when it is sold to customers by distribution or upon orders on demand, considering all its activities, it is intrastate business. This is true though the gas so furnished is drawn from interstate mains."

A concurring opinion was filed by Mr. Justice McKinney and a copy of this opinion is attached hereto. In this opinion, Mr. Justice McKinney said:

> "I concur in the conclusion announced in the majority opinion upon the ground that the involved tax can be sustained under the principles announced in Southern

Nat. Gas Corp. *v.* Alabama, 301 U. S. 148, 81 L. ed. 970, and Atlantic L. Co. *v.* Com'r of Corp. and Taxn., 298 U. S. 553, 80 L. ed. 1328. In those cases the court, in distinguishing them from that of Ozark Pipe Line Corp. *v.* Monier, 266 U. S. 555, 69 L. ed. 439, emphasized the fact that oil was neither received nor delivered in Missouri, and indicated that had it been so received or delivered the result would have been different; and, as I interpret the opinion in the Alabama Case, it makes no difference whether the delivery is to the consumer or distributor or to both.

"• • • This gas is delivered in greatly reduced pressure from that in which it is piped into Memphis, and complainant operates pressure control stations in Shelby County, Tennessee, for that purpose. This gas flows into Memphis in an 18-inch pipe where it is broken up and distributed in pipes varying in diameter from 10 inches to 3 inches. This, under my interpretation of the decisions of the Supreme Court of the United States is, so to speak, 'a breaking of the original package,' which, in connection with the other activities of complainant in Memphis and other sections of West Tennessee, constitutes 'engaging in business in the state' so as to subject it to the tax."

A dissenting opinion was filed by Mr. Justice Chambliss, and a copy of that opinion is attached hereto.

On June 7, 1941, appellant filed a petition to rehear, in which it was asserted that the statute as construed and applied by the Supreme Court of Tennessee, was violative of Article 1, Section 8, Clause 3, of the Constitution of the United States. Said petition to rehear quoted from appellant's brief that part hereinabove quoted.

This petition to rehear was overruled by the Court on June 28, 1941, in an opinion of Mr. Justice Fancher. Copy of this opinion is attached hereto. In the opinion Mr. Justice Fancher said:

"The claim of constitutional right under Art. 1, Sec. 8, Clause 3, of the Federal Constitution was pre-

sented in the original bill of complainant and in briefs and argument. In refusing to sustain the bill and in holding that the business of complainant, furnishing gas in a joint undertaking with the distributing corporation, and in its business relationship as a whole was intrastate, obviously the claim of federally protected right was decided adversely to complainant."

E.

The following cases are believed to sustain the jurisdiction of the Supreme Court of the United States:

The validity of a State statute is drawn in question under Section 237 of the Judicial Code, as amended, when it is claimed that as construed and applied by the court of last resort of the State, it violates the commerce clause of the Constitution of the United States, being Article 1, Section 8, Clause 3, of said Constitution.

Merchants National Bank of Richmond v. *City of Richmond*, 256 U. S. 635;

Eureka Pipe Line Company v. *Hallanan*, 257 U. S. 265;

United Fuel Gas Company v. *Hallanan*, 257 U. S. 277;

Dahnke-Walker Milling Company v. *Bondurant*, 257 U. S. 282.

F.

The questions involved in this appeal are substantially within the rule of *Zucht* v. *King*, 260 U. S. 174. The Supreme Court of the United States has repeatedly held that transportation of natural gas under circumstances similar to those here involved is interstate commerce, and that a tax cannot be constitutionally imposed upon the same by State statutes.

State Tax Commission of Mississippi v. *Interstate Natural Gas Co.*, 284 U. S. 41, 76 L. ed. 156 (1931);

Eureka Pipe Line Co. v. *Hallanan*, 257 U. S. 265, 66 L. ed. 227 (1921);

Public Utilities Commission of Kansas v. *Landon*, 249 U. S. 236, 63 L. ed. 577 (1919);

Missouri, ex rel. Barrett v. *Kansas Natural Gas Co.*, 265 U. S. 298, 68 L. ed. 1027 (1924);

East Ohio Gas Co. v. *Tax Commission of Ohio*, 283 U. S. 465, 75 L. ed. 1171 (1931);

Ozark Pipe Line Corp. v. *Monier*, 266 U. S. 555, 69 L. ed. 439 (1925).

Under the rule of these cases, Memphis Natural Gas Company's transportation of gas was not subject to the excise tax and when the Supreme Court of Tennessee construed and applied Sections 1316-1318 of the Official Code of Tennessee of 1932 so as to impose a tax upon this sale and transportation of natural gas, the Act was then violative of Article 1, Section 8, Clause 3, of the Constitution of the United States.

WALTER P. ARMSTRONG,
T. A. MCEACHEM, JR.,
Solicitors for Memphis Natural Gas Company.

EXHIBIT "A".

Opinion of Chancellor R. B. C. Howell, Chancellor, Chancery Court of Davidson County, Tennessee.

IN CHANCERY—Part One.

Rule No. 53369

MEMPHIS NATURAL GAS COMPANY

vs.

LEWIS S. POPE, ET AL.

The record in this cause presents a mixed question of law and fact growing out of the claim by the defendants, officials of the State, that the complainant is liable for an assessment for excise taxes for the years 1932 to 1935 inclusive, amounting to about $60,000.00.

It is the contention of the complainant that it is engaged solely and exclusively in interstate commerce and that all of its earnings during the years in question arose entirely from interstate business, which is especially excluded from the provisions of the excise tax law, while the defendants claim that the business done by the complainant, or at least a part thereof, is intrastate commerce, and therefore the complainant is liable for excise taxes for the years in question.

There is very little if any, conflict in the testimony as to the actual business transacted by the complainant, the controversy in this regard being whether or not that business so conducted is interstate or intrastate commerce.

The Court finds the facts to be:

The complainant is the owner and operator of a gas pipe line extending from the gas fields near Monroe, Louisiana, through the states of Arkansas, Mississippi and into the State of Tennessee, near Memphis, the gas transported by it being purchased under a contract from the United Gas Pipe Line Company and the delivery of the gas to it is made at a station near Monroe, Louisiana. This gas is transported into pipe lines through the states of Louisiana, Ar-

kansas, Mississippi and into Tennessee, and, at points along said line outside the State of Tennessee, delivery is made to certain customers which are public utility distributing companies, and in Tennessee is delivered to two purchasers, public utility distributing companies, one the Memphis Power & Light Company at Memphis, Tennessee, and the other the West Tennessee Power & Light Company, outside of Shelby County, Tennessee. The contracts for the purchase of gas by these two companies were entered into in the State of New York. Delivery of gas in the State of Tennessee is made at a station called The City Gate Meter Station, at which place the gas is withdrawn from the pipe line of complainant and moves in a continuous flow out of said pipe line and into the distributing pipe lines of the two public utility distributing company customers, who in turn serve many local consumers.

Part of the gas delivered to the Memphis Power & Light Company in the City Gate Meter Station, is transported by it through its own pipe line to its electric generating stations where it is consumed in the operation of a generating plant by said company, and the remainder is sold by it to local customers.

The complainant does not own or operate any tanks, reservoirs or equipment used for the storage of gas in Tennessee. Said gas does not come to rest in the State of Tennessee, but passes in a continuous flow into the pipe lines of complainant's two Tennessee customers.

The complainant company does not operate or maintain any equipment of any kind used in the distribution of gas in Tennessee, nor does it have any ownership or control of said gas after it is delivered, as above stated, into the distributing lines of the public utility distributing companies.

The complainant sells gas under contracts with the two public utility distributing companies in Tennessee, and its relation with them is that of buyer and seller, and such has been its relation during the years in question here.

The complainant maintains an office in Memphis, Tennessee, and the business transacted at this office during the years in question was exclusively the operation and management of the company's pipe line referred to. The Court

therefore finds that under these circumstances the business conducted by the complainant company is wholly interstate commerce and therefore exempted by the express provisions of Section 1316 of the Tennessee Code which excludes earnings arising from interstate commerce.

It is contended by the defendants that the contract between the complainant and the public utility distributing companies constitutes them partners in business and that for this reason the complainant is engaged in intrastate business.

From a careful examination of the contract in question the Court is satisfied that these public utility companies are the buyers of gas from the complainant company, and that the arrangements made as to the price to be paid for the gas delivered does not change or affect the nature of the complainant's operations in the State of Tennessee.

It is insisted by the defendants that because the complainant filed its charter with the Secretary of State that this is an admission that it is engaged in intrastate business. This does not necessarily follow. Many corporations have charters filed in the State of Tennessee under which they may be authorized to engage in a certain character of business, but do not do so, and the tax in this case is based upon the business *done* in the State of Tennessee as a matter of fact. It is also insisted by the defendants that the complainant company is an integral part of the Electric Bond and Share group of corporations and so interlocked with the corporation in Louisiana from which it purchases its gas, and the corporate purchasers from it in Tennessee, that they are component parts of the same enterprise and therefore liable for the tax. After a careful examination of all the proof and the entire record, the Court is of opinion that this contention of the defendants is not established. The Electric Bond and Share group of corporations do not dominate and control the complainant corporation and the complainant's dealings with the defendants distributing companies has been by contract entered into after much discussion and some delay, which constitute these distributing corporations buyers of gas from the complainant company in the ordinary course of trade, and not by reason of any dominating influence of a holding company.

The Court having concluded from the facts and the law that all of the earnings of the complainant company in the operation of its pipe line business during the years in question, were derived from interstate commerce, such earnings being expressly excluded by the terms of the sections of the Code hereinabove referred to, and the complainant is not liable for said excise tax and the temporary injunction heretofore granted should be made permanent.

Decree accordingly.

R. B. C. HOWELL, *Chancellor,*
Part One, Seventh Chancery
Division, Nashville, Tennessee.

March 1, 1940.

EXHIBIT "B".

Opinion Mr. Justice Green, Supreme Court of Tennessee on Petition for Supersedeas.

MEMPHIS NATURAL GAS COMPANY

vs.

LEWIS S. POPE, ET AL.

DAVIDSON EQUITY—Filed July 8th, 1938.

David S. Lansden, Clerk.

MEMORANDUM

In *Express Company* v. *Patterson,* 122 Tenn., 279, it was held that since the Legislature had provided no law for the assessment of intangible property of foreign corporations, the jurisdiction of the Chancery Court might be invoked to enjoin proceedings looking to that end.

To the same effect was *Fertilizer Company* v. *McFall,* 128 Tenn., 645.

For a stronger reason an injunction may be sought against proceedings by the State's fiscal officers to consummate a tax which the Legislature has expressly *excluded.* The corporation excise tax is imposed upon net earnings

"arising from business done wholly within the State, excluding earnings arising from interstate commerce." Code 1316.

The bill in this case avers that all the net earnings made the basis of the excise tax sought to be enforced arose from interstate commerce and sets out the facts in detail. There are certainly facts enough stated in the bill to call for an answer from the fiscal officers of the State by way of justifying the authority of the Commissioner in the premises.

In the Gasoline tax cases, 170 Tenn., 183, errors of judgment only were charged against the commissioners. Here his power—his jurisdiction—is challenged. The power and jurisdiction of tax officials or boards is open to inquiry in the Chancery Court and they may be restrained when acting beyond their authority or illegally. *Briscoe* v. *McMillan*, 117 Tenn. 115, *Smoky Mt. etc. Co.* v. *Lattimore*, 119 Tenn. 620.

I think the Chancellor did not exceed his jurisdiction in granting the injunction herein and the application for certiorari and supersedeas is denied.

GREEN, *C. J.*

EXHIBIT "C".

Majority Opinion of the Supreme Court of Tennessee.

COPY

MEMPHIS NATURAL GAS COMPANY

vs.

LEWIS S. POPE, ET AL.

DAVIDSON EQUITY—Filed May 17, 1941.

David S. Lansden, Clerk.

OPINION

The complainant, a Delaware corporation, domesticated in Tennessee with its chief place of business in Memphis,

Tennessee, filed the bill against certain officials and tax collectors of the State of Tennessee to enjoin the collection of excise taxes for the years 1932 to 1936 and for a declaration of rights, status and legal relations. An injunction was obtained to prevent the levies by distress proceedings.

The excise tax is that provided by 1932 Code, sec. 1316 et seq. It is alleged that the assessments are in violation of constitutional rights, asserting that the taxes are on the right to do business which is exclusively interstate commerce.

The bill was sustained by the chancellor and the injunction made permanent.

Upon appeal and proper assignments of error, extensive briefs and argument, the case is here. The essential facts which are presented by evidence supported by the pleadings are as follows:

The Memphis Natural Gas Company was promoted and organized in 1928 and it and Memphis Power & Light Co., were associated together by contract in furnishing natural gas brought from the gas fields at Monroe, Louisiana, into the State of Tennessee. Complainant brings the gas in pipe lines, the entire line with its branches in Tennessee extending 370.5 miles in length. Complainant has a contract with Memphis Power & Light Co., to distribute the gas to consumers in Shelby County, Tennessee, and with West Tennessee Power & Light Co., which distributes the gas to other places in West Tennessee.

The excise taxes for the years 1932-1936, both inclusive, enjoined, amounted to $57,156.83. Since the bill was filed the taxes for 1936 were withdrawn from the litigation by the defendants.

There are compressor stations along the transportation line at intervals to force the flow of gas. Complainant furnishes one buyer in Arkansas, the Arkansas Power and Light Company, and none in Mississippi.

The gas is delivered to Memphis Power & Light Co., at Brooks Avenue in Memphis, and nine other stations in Shelby County, with measuring meters at each. The gas is measured by the cubic foot, or, in thousands of cubic

feet. The meter instruments act by means of recorded pressure on charts.

The deliveries to West Tennessee Power & Light Company are at seven points by like measures of gas flow. By contract with West Tennessee Power & Light Co., complainant extended its pipe line at its own expense for purposes of delivery by main lines and laterals from Memphis to the towns of Covington, Brownsville, Ripley, Jackson and Humboldt in West Tennessee, and these lateral lines are owned and operated by complainant.

The flow from the fields in Louisiana is continuous until delivered at these stations. There is an attempt to obtain a constant pressure along the main pipe line at a much higher pressure than can be used in the distribution lines.

At these meter stations, where the gas is delivered by Memphis Natural Gas Company to the distributing corporations, an attempt is made by Memphis Natural Gas Company to obtain a constant pressure in order that the gas may be measured, and an apparatus is used to reduce the pressure as it enters the distribution systems. To do this it is necessary to keep in touch with the requirements of the various markets from hour to hour, and men are kept on the operations for this purpose. The stations are so operated to suit the conditions that prevail at any time. During certain hours of use, the load is diminished more rapidly and a regulator machine is used to control pressure.

Complainant uses a private telephone line extending the length of the pipe lines and a dispatcher is kept at Memphis to control the unput of gas and to report troubles. Line walkers and repair crews keep up the lines.

The books and records of Memphis Natural Gas Company are kept at Memphis in its main office, and its entire business is conducted from Memphis as its general headquarters. It owns its own pipe lines and purchase the gas from a producing company. The President of Memphis Natural Gas Company lives in Memphis. The offices consist of eight rooms, and approximately twelve people are employed in the offices.

The distributing lines and appliances for sale and distribution belong to Memphis Power and Light Company.

Each of these companies employs its own men and makes its own purchases of materials.

The per cent of revenues of Memphis Natural Gas Company derived from Memphis Power and Light Company, to its total revennes, was:

1932	83.24%
1933	83.08%
1934	81.47%
1935	80.06%

So that the bulk of all complainant's revenues from every source is derived from its business done with and through Memphis Power and Light Company.

These two corporations cooperated jointly in the scheme of bringing natural gas into Memphis and distributing it to the consuming public. For this purpose and coincidentally a franchise was obtained from the City of Memphis. This franchise runs in the name of Memphis Power and Light Company. However, at the same time, the contract hereinafter set forth was executed by and between Memphis Natural Gas Company and Memphis Power and Light Company and this contract was filed with the City as a part of the contract with the City by which the twenty-five year franchise was granted. A provision in the contract, which materially affects the obligations to the City of Memphis, representing the public and affecting the material rights of both these companies financially, will be referred to and explained later. The case, as we view it, largely turns upon the contract between these two companies, and with the City. This contract between the two companies is named a contract of bargain and sale. Memphis Natural Gas Company is called Seller and Memphis Power and Light Company is called Buyer; and it is argued that by its terms, Seller sells to Buyer all the gas it will need. The contract is complicated and long. A study of it leaves one with an impression that there was a studied effort to cover up a pooling of interests with the varnish of a sale. To understand it there is required more than surface inspection of the varnish. We must look through the gloss finish and see what is underneath.

It is argued by counsel for complainant that there is a sale of gas at a fixed price, subject to future adjustment; and that the gas is delivered to the buyer in direct flow of interstate commerce. Counsel for defendants contend that the provision for sale at a stipulated price is but part of a scheme of partnership in which the so-called seller is a partner with the buyer and engaged with it in the sale and distribution of gas to local consumers and that each party is interested in the business conducted by the other.

At the present time, under the Uniform Partnership Act in Tennessee, the word person includes Corporations; and in the provisions defining partnerships the word person is used in such way as to indicate that a corporation may be a partner. Code 7841, 7845.

The sharing by a person of profits of a business is *prima facie* evidence he is a partner in the business. Code 7846.

But, whether a corporation can technically become a partner, or whether it requires charter authority to become a partner, a corporation can make contracts in pursuance of its corporate powers that will bind it in joint adventures or undertakings. And, even without joint control of the operations that produce profits, persons or corporations may establish relationships that will result in a sharing of profits, each with the other. There is no law against two public utilities engaged in supplying gas to a community to so divide or parcel their work as to give each a separate management of a portion and then pool their earnings, regardless of the technical rules of partnership. The right to contract is free enough to include such an arrangement, and there is no vice in it.

One may be an agent of the other in details, but activities do not have to be classified to make them lawful.

In this contract of May 24, 1928, which was executed between Memphis Natural Gas Company and Memphis Power and Light Company, and presented to the City of Memphis to induce the City to grant the franchise, it was stipulated that the seller agrees to sell and the buyer agrees to buy, take and pay for such amounts of natural gas as may be requisite to fulfill all contracts for sale; and second, for the use by the buyer for its electric generating plant.

By the Fifth Article, the seller was to furnish, install, operate and maintain at its own expense a regulating and measuring station and meter the gas with certain temperature and specific gravity tests.

By the Sixth Article subject to adjustment provisions in Article Eleventh, certain graduated prices or rates, according to the class of use, were named.

By the Ninth Article, briefly stated, the seller monthly to deliver to buyer and to the city of Memphis, a statement setting forth in reasonable detail:

1. Seller's investment, including cost of pipe lines, installations, etc.

2. Gross revenues from sale of gas to seller.

3. All costs of maintaining and operating.

4. Costs of renewals, replacements, etc.

5. Amount necessary for a fifteen year 6% sinking fund to amortize seller's investment.

6. All taxes.

7. Six percent at the end of each year of seller's investment for extraordinary maintenance, renewals, replacements or amortization.

8. Net surplus or net deficit of seller for the contract year.

By the Tenth Article, buyer was to deliver, yearly, to seller and to the City of Memphis, the same information of its affairs and operations as those required of seller, listed above.

The Eleventh Article is lengthy, but its importance warrants its copy in full as follows:

"ELEVENTH: It is understood and agreed by the parties hereto that the amount of the combined net surpluses or combined net deficits of the buyer and the seller for each contract year, as shown by the statements rendered under Articles NINTH and TENTH hereof, shall (until after the provisions of the next succeeding paragraph shall have

become operative) be equally divided between the buyer and the seller by a cash adjustment to be made each year as soon as possible after the rendering of the statements provided for in Articles NINTH and TENTH hereof, and at the same time the parties shall agree upon such adjustments, if any, in the rates set forth in Article SIXTH hereof as may be calculated to be necessary in order as nearly as possible to effect an equal division of any contemplated combined surplus and/or deficit for the contract year then current and for subsequent contract years.

If in any contract year (a) all the net deficits of both parties for all contract years up to such time, as shown by the statements rendered under Articles NINTH and TENTH hereof, shall have been made up and (b) in addition thereto, the buyer shall have received from the combined net surpluses, as shown by such statements, an amount equal to one and one-half percent of each of the respective amounts of the buyer's investment shown under (7) of the statements rendered under Article TENTH for each and every respective contract year up to such time, then the entire balance of the combined net surplus for such contract year shall be paid to or retained by the seller and thereafter no further changes in the rates set forth in Article SIXTH hereof (or in such rates as theretofore adjusted under the foregoing provisions of this Article ELEVENTH) shall be made except such changes in such rates, if any, as may be required under the provisions of the next succeeding paragraph of this Article ELEVENTH. In all subsequent contract years, the entire balance of the buyer's net surplus for each subsequent contract year over and above an amount equal to one and one-half per cent of the amount of the buyer's investment shown under (7) of the statement rendered under Article TENTH for such subsequent contract year shall be paid to the seller.

In each and every contract year during the continuance of this agreement or any extension thereof after (A) all the net deficits of both parties for all contract years up to such time, as shown by the statements rendered under Article NINTH and TENTH hereof, shall have been made up and (B) in addition thereto, the Buyer shall have received from the combined net surpluses, as shown by such state-

ments, an amount equal to one and one-half per cent of each of the respective amounts of the buyer's investment shown under (7) of the statements rendered under Article TENTH for each and every respective contract year up to such time, and (C) in addition thereto, the seller shall have received from the combined net surpluses, as shown by such statement, net earnings affording it a reasonable return in view of the hazards of the undertaking of the seller at the inception thereof, upon the respective amounts of the seller's investment shown under (7) of the statements rendered under ARTICLE NINTH for all contract years up to such time, then the seller and the buyer agree to and will cooperate to bring about a reduction in the rates to be charged by the buyer to its customers in the following manner:

1. The parties shall agree upon such adjustment in the rates set forth in Article SIXTH hereof (or in such rates as theretofore adjusted under this Article ELEVENTH) as may be calculated to be necessary in order as nearly as possible to reduce the operating expenses of the buyer in subsequent contract years by an amount equal to the balance of the combined net surplus for such contract year over and above the deductions contemplated by subdivisions (A), (B) and (C) of this paragraph, and

2. The buyer shall then reduce its rates to its consumers in such amount as may be calculated to be necessary in order as nearly as possible to effect a reduction in the gross revenues of the buyer for ensuing contract years in an amount equal to the balance of the combined net surplus for such contract year over and above the deductions contemplated by subdivisions (A), (B) and (C) of this paragraph. It is agreed that such reduction of rates by the buyer pursuant to the provisions of this paragraph of this Article ELEVENTH, shall be applied first toward lowering the price of gas to domestic consumers.

Each party shall have the right to examine the books, records, vouchers, and charts of the other party to the extent necessary to verify the accuracy of any statement, charge, or adjustment made pursuant to the provisions of

any Article hereof. If such examination reveals any inaccuracy in the statements, charges, or adjustments theretofore made, the necessary adjustment shall be promptly made.

The City of Memphis shall have the right by a reputable firm of certified public accountants or engineers, appointed by resolution of the City Commissioners, to examine the books and accounts of the parties hereto to the extent necessary to verify the accuracy of any statement or adjustment made under or pursuant to the provisions of said Articles NINTH, TENTH or ELEVENTH. If such examination reveals any inaccuracy in the statements or adjustments theretofore made, the necessary adjustments shall be promptly made."

There is filed copy of the franchise granted by the City of Memphis to the Memphis Power and Light Company until January 1st, 1958. This franchise shows that the contract between the pipe line corporation and the grantee is filed with the City and contemplates the cooperation of the two concerns, and provides a scale of rates to the consumers for gas. It is in this way indicated that the City is a contracting party with both these utility corporations.

The City of Memphis is a party to the contract in that, if Memphis Natural Gas Company realizes the net profits provided for on its investment from the inception of the enterprise, there is an adjustment of rates and the gas rate is reduced down to take up that excess profit. Thus we see complainant is dealing with the public in Memphis, represented by the City of Memphis.

The entire setup and the whole contract between the two companies and the public shows a joint understanding. Mr. Johnson, President of the complainant company, in cross-examination, was asked by Mr. Pope, a hypothetical question as follows:

"Suppose on the 10th day of January, 1935, the Memphis Power and Light Company had made enough profits on its business to have complied with all these conditions in here: that is, 6% we will say, the reasonable return to them, the same amount to you, and suppose they would have had $50,000 left over and above that, and after they had realized

one and one-half per cent on their investment, what would have become of that $50,000 under this contract?"

After much pressure by the attorney and much evasion by the witness, driving at the making and disposition of the supposed $50,000, witness said:

"I would not say it is made by the Memphis Power and Light Company."

Q. by Mr. Pope: "Who is it made by?"

Answer: "It is made by both of us."

The witness admitted the fallacy of his own position when he said such supposed $50,000 of net earnings had been made by both companies; and he finally was forced to admit that such supposed net balance would go under section Eleventh to the pipe line company. That resulted under the following provision in section 11 of the contract:

"If in any contract year (a) all the net deficits of both parties for all contract years up to such time, as shown by the statements rendered under Articles Ninth and Tenth hereof, shall have been made up and (b) in addition thereto, the buyer shall have received from the combined net surpluses, as shown by such statements, an amount equal to one and one-half per cent of each of the respective amounts of the buyer's investment shown under (7) of the statements rendered under Article Tenth for each and every respective contract year up to such time, then the entire balance of the combined net surplus for such contract year shall be paid to or retained by the seller. * * *"

It will be seen that by the above provision, not only is "seller" a participant in the profits of the distribution of gas in Shelby County by the Memphis Power and Light Company, but after a certain situation is reached the "seller" would receive all the remaining profits of the distribution.

It is not necessary to determine when title to the gas passed to Memphis Power and Light Company, or whether title ever actually passed. If title passed, then, still the business conducted in distributing to consumers was for and on behalf of both these development and oper-

ating corporations, and Memphis Natural Gas Company was engaged through its co-operative in intrastate business in Tennessee.

The price of gas, if there ever was an actual sale, was not and could not be determined until after the gas had been delivered to the ultimate consumer. Our view is, that there is not a fixed price in Article Sixth which is merely adjusted by Article Eleventh, but in reality there was an operation in which both companies were jointly interested. There was an allotment of work performed but a division of the entire results of that work.

Whether the scheme of separate corporate entity, but joint profit, was designed in the beginning for purposes of economy, safety in business and to escape taxation, is a matter which may very reasonably be concluded.

There seems to be separate corporate entity, as was found by the Chancellor. This does not preclude a conclusion that these gas companies acted in concert and each was a party to and interested by contract in the operations, profits and/or losses of the other and that the whole business is so intertwined as to make their business joint. The business done in Tennessee by complainant with the West Tennessee Power and Light Company amounted to approximately one or two (1%-2%) percent during the years in question.

The business done with Memphis Power and Light Company for its generating plant bore the following proportion to its total business with that company:

1932	33.49%
1933	33.22%
1934	27.78%
1935	24.34%

This gas furnished to the electric generating plant was on a straight buyer and seller contract basis to furnish gas on demand. This contract was separate from the distribution contract hereinbefore discussed, but was to take effect contingent on that one being executed.

It is improper to look alone to Article Sixth, which ostensibly shows a sale, but the whole arrangement must be seen. In illustrating a unit composed of many parts, the great

Apostle spoke of the human body as being many members in one body. He said "The eye cannot say unto the hand, I have no need of thee." This philosophy is the modern doctrine of construction.

Considering what is interstate commerce, the technical considerations of when things come to rest, or continuity of flow; of original package or the breaking up, and the like, are not the last word. In the whole field of law we find first, technical measurements, and then come practical considerations. Once we looked to controlling phrases, then later the four corners of the instrument. These are the processes of evolution in the law.

In the instant case we take Article Sixth for what it is worth and for what it was intended. It is a mathematical formula inserted to help in the measurement of profits, to be divided when complainant is given credit for the process therein mentioned as applied to the various uses to be made of the gas; and Memphis Power and Light Company is given credit for the sales to the various users of gas and the upkeep and amortization of invested capital is counted; and a certain stipulated profit is calculated, then the profits are divided among the entire enterprise.

We are not to be deceived by subtle arguments over passages considered singly. The whole field of the enterprise must be seen to comprehend it. It is considerably like two partners, one to buy and haul in, another to sell, with two bank accounts and two sets of books, and at the end of each year a division of profits. The buying partner turns in the goods at certain prices, but these prices are just figures. In the end there is a division. They are both merchants in the same enterprise.

There is testimony from which defendants say there is a union between these utility corporations. It is insisted from the evidence that Memphis Power and Light Company and West Tennessee Power and Light Company are registered subsidiaries of the National Power and Light Company, it being a subsidiary of Electric Bond and Share Company, owning 99.9% of the voting stock of Memphis Power and Light Company and 100% of the stock of West Tennessee Power and Light Company. Also, that com-

plainant is a part of the Electric Bond and Share Company group, by ownership of an interest in its stock.

The case of Lone Star Gas Company *v.* Texas, 304 U. S. 224, 82 L. ed. 1304 and other cases are cited, which hold that if a corporation sells gas in a state to associations or corporations having the same parent holding company, the business is intrastate commerce. There is exception to the competency of this evidence on the ground that the experts obtained their information from Moody's Manual and is therefore hearsay. Assignment of error is made by complainant on this appeal to the ruling of the chancellor admitting this evidence. We do not pass upon this evidence or its effect. The authorities so holding that such a combination is incompatible with the idea of interstate commerce is equal authority for a denial of the claim where the unity between the parties is a contractual bond.

Affiliated companies cannot be more effectually united than those bound together by bonds of joint adventure. The bond here is like the union of the Siamese twins. There are separate hands and feet and heads, but a union of the two bodies. That bond is the contract. The hands on one side bring in, and on the other distribute. Twin A gets half the money; Twin B gets the other half up to a certain point, and then Twin A gets it all. Counsel for complainant has what he calls his "paper book." It contains the cases from West Publishing Company leaves, collecting the various cases considering interstate commerce in natural gas transportation. While the cases are unlike the instant one, we are justified in holding that though the gas has come into Tennessee in a movement that is interstate in character, yet when it is sold to consumers by distribution or upon orders on demand, considering all its activities, it is intra-state business. This is true though the gas so furnished is drawn from interstate mains. Southern Natural Gas Corporation v. Alabama, 301 U. S. 148.

Many of the facts in the above case are like those here. As here, the complaining company was bringing gas from the fields in Louisiana into Alabama, where it had contracts with four purchasers, three of which were intrastate utilities and one, the Tennessee Coal, Iron and Railroad Company, purchased gas for itself and affiliated companies. The

complainant had a Delaware Charter but had domesticated in Alabama and had its chief office in Birmingham, where it conducted—as in this case—its entire business. It paid its annual required permit fee, as here. It constructed its lines reaching into Georgia. It possessed various items of property in Alabama, constituting its general transmission system. A majority of orders for gas were received by and cleared through the Birmingham office. All collections from sales were received and disbursements for expenses were made or authorized at that office. The sales to the Tennessee company and its affiliates were made from time to time upon orders given at the Birmingham office, given as the needs of the purchaser required. The gas sold was delivered in continuous movement from the gas fields without break or interruption to the point where it was delivered, viz: the meter house, where it was measured for the purpose of payment. The gas was moved under unregulated pressure. The pressure was reduced at the point of delivery for the accommodation of the purchaser to meet his requirements. The contracts with the companies contained provisions as to delivery, pressure, measurements, etc.

The measuring equipment belonged to seller. In the contract with the Tennessee company the seller provided at its expense service lines at the buyer's Bessemer plant and another plant, widely separated.

The main difference in the above case on the facts, to the facts here, consists in the seller providing the service lines to the Tennessee company, and the further fact that there was no association between seller and buyer as in the instant case. We regard the instant case a stronger one to support the tax because of this joint enterprise feature.

Chief Justice Hughes wrote the opinion affirming the Alabama Supreme Court, in which it was said:

"From the agreed facts we are unable to conclude that the business thus conducted in Alabama was entirely an interstate business. While the gas which appellant sold was brought into the State from Louisiana it appears that appellant carried on in Alabama activities of an intrastate character."

As in other more recent cases, the Supreme Court apparently treated it as a case problem on all its facts.

Complainant charges in the bill that the excise taxes for the years 1932 and 1933 are barred by the Statute of Limitations of three years, the due date for payment being July 1st, 1933, and July 1st, 1934.

The Statute pleaded is section 1487 of our Code. It is attached to authority for back assessing taxes upon property, and the limitation is: "but no taxes on property for more than three years back shall be assessed and collected where they have not been assessed and not paid in consequence of the errors or omissions of former collectors or assessors."

On its face this only applies to property taxes. Counsel refer to an expression in Foppiano *v.* Speed, 113 Tenn. 167, 173. The tax there involved was a tax imposed upon persons selling beer, or any quantities of liquor on steamboats or any other vessel or watercraft, or from railroad cars; and they were required to pay a tax in lieu of all other taxes of $200 per annum. The Court said:

"The limitation of three years is fixed in analogy to the limitation fixed upon other back taxes."

The tax in that case was to take the place of any property or other tax. The tax here is a corporation excise tax which has no relation to property taxes. The tax here imposed is provided, not in the Article where the three year limitation is found, but in the Article on Excise Taxes—a different subject of taxation—which provides for a different system of collection by means of different officers therein designated. The collection is made by the Commissioner of Finance and Taxation. No limitation is provided by the Act.

There is a general limitation on collection of all taxes, of whatever nature, contained in Section 1494 of the Code, and fixes the time within six years. We think this six year limitation is the one applicable here, and not the limitation of assessors and collectors by county officials to back assess property. The tax analogy is not sufficiently complete for a court to set up by judicial construction a limitation imposed in a special but different situation.

The decree of the chancellor is reversed, the injunction dissolved and the bill dismissed at complainant's cost.

Defendants may take a reference for damages as against the injunction bond for the wrongful suing out of the injunction.

Mr. Justice Chambliss dissents.

FRANK T. FANCHER,
Special Judge.

Office of Clerk of the Supreme Court for the Middle Division of the State of Tennessee

I, David S. Lansden, Clerk of said Court, do hereby certify that the foregoing is a true, perfect, and complete copy of the Opinion of said Court, pronounced at its December term, 1940, in case of Memphis N. Gas Co. against Lewis S. Pope, et al., as appears of record now on file in my office.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of the Court, at office in the Capitol at Nashville, on this, the 17th day of May, 1941.

(Signed) DAVID S. LANSDEN, *Clerk.*

(Seal.)

EXHIBIT "D".

Concurring Opinion of Mr. Justice McKinney, of Supreme Court of Tennessee.

DAVIDSON EQUITY.

MEMPHIS NATURAL GAS COMPANY,

vs.

LEWIS S. POPE, et al.

OPINION

I concur in the conclusion announced in the majority opinion upon the ground that the involved tax can be sustained under the principles announced in *Southern Nat. Gas. Corp.* v. *Alabama*, 301 U. S. 148, 81 L. ed. 970, and

Atlantic L. Co. v. *Com'r of Corp. and Taxn.*, 298 U. S. 553, 80 L. ed. 1328. In those cases the court, in distinguishing them from that of *Ozark Pipe Line Corp.* v. *Monier*, 266 U. S. 555, 69 L. ed. 439, emphasized the fact that oil was neither received nor delivered in Missouri, and indicated that had it been so received or delivered the result would have been different; and, as I interpret the opinion in the *Alabama* case, it makes no difference whether the delivery is to the consumer or distributor or to both.

In the instant cause, complainant piped the gas from Louisiana to Memphis, where, under one contract, a portion of it was turned into a smaller pipe and delivered to the municapility for consumption at its electric generating plant. Under another contract this gas delivered to the municapility at three or four other stations in Shelby County for distribution to its patrons. By a third contract complainant delivered gas to the West Tennessee Power & Light Company at six stations throughout West Tennessee for distribution to its patrons. This gas is delivered in greatly reduced pressure from that in which it is piped into Memphis, and complainant operates pressure control stations in Shelby County, Tennessee, for that purpose. This gas flows into Memphis in an 18-inch pipe where it is broken up and distributed in pipes varying in diameter from 10 inches to 3 inches. This, under my interpretation of the decisions of the Supreme Court of the United States, is, so to speak, 'a breaking of the original package,' which, in connection with the other activities of complainant in Memphis and other sections of West Tennessee, constitutes 'engaging in business in the state' so as to subject it to the tax.

(Signed) McKinney, *J.*

Office of Clerk of the Supreme Court for the Middle Division of the State of Tennessee.

I, David S. Lansden, Clerk of said Court, do hereby certify that the foregoing is a true, perfect, and complete copy of the Opinion of said Court, pronounced at its December term, 1940, in case of Memphis N. Gas Co. against Lewis S. Pope, et al., as appears of record now on file in my office.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of the Court, at office in the Capitol at Nashville, on this, the 17th day of May, 1941.

(Signed) DAVID S. LANSDEN, *Clerk.*

(Seal.)

EXHIBIT "E".

Dissenting Opinion of Mr. Justice Chambliss of Supreme Court of Tennessee.

DAVIDSON EQUITY.

MEMPHIS NATURAL GAS COMPANY

v.

LEWIS S. POPE, ET AL.

DISSENTING OPINION

I am constrained to dissent. It is clear and I think, in effect, recognized on the briefs of the State and in the opinion of the majority, that the flow of the gas in question is continuous across State lines into Tennessee to the points of delivery, without having come previously to a stop, to (1) Memphis Power & Light Company and (2) West Tennessee Power & Light Company, intrastate distributors of the gas. As I understand the holding of liability is rested on the theory and finding that the interstate seller and shipper and the intrastate buyer and distributors are co-partners, jointly interested in the business of gas distribution to consumers locally, the parties operating under a profit sharing plan, and that, therefore, the tax applies to all of the product conveyed through its pipe lines into this State from its wells in Louisiana. (This liability is held to apply not only to the gas sold and delivered to the Memphis Power & Light Company, whose relations with the Memphis Natural Gas Company are construed to have the effect above stated, but extended to the gas sold and delivered to the West Tennessee Company also.)

While this theory is stated forcefully and plausibly, I am unable to accept it. At last, upon analysis, the arrange-

ment between these Companies, conceded to be legally distinct corporate entities, held to constitute, in effect, a partnership, relates alone to the method and measure of the compensation which the interstate seller and shipper receives for its product from the interstate buyers and distributors.

No authority is cited for the adoption of the method or extent of payment by a buyer of goods shipped interstate, as a factor determining the taxability of the product. The opinion of Hughes, C. J., in *Southern Natural Gas Corporation* v. *Alabama*, 301 U. S. 148, cited and quoted from in the majority opinion, does not adopt or discuss this theory of partnership profit sharing, or joint enterprise. Liability was predicated in this case on a finding that the Gas Company *itself*, not through another, "carried on in Alabama activities of an intrastate character," taking orders and making sales and maintaining service lines to various and sundry consumers, etc. The majority opinion concedes that in that case "there was no association between seller and buyer."

Not only do I find no case where such an "association" of the buyer and seller has been dealt with, but I am impressed that the opinion of Mr. Justice Cardoza in *People, ex rel. Pa. Gas Co.* v. *Saxe, et al.*, 229 N. Y., 446, announces the correct principle to the effect that the liability for taxes to a State on goods shipped into a State, does not turn on, and is not to be determined by, the amount, measure or method of compensation; and that a plan of payment under which the amount of compensation is determined by the profits earned by the buyer distributing the product does not deprive the interstate seller of the exemption inuring under the commerce clause. In that case the compensation of the interstate shipping Company was based on the gross receipts of the local distributor. The contracts were what is known as "requirement" contracts, that is, the amount delivered was determined by the requirements from time to time of the distributors. Cardoza, J., writing the opinion for the court, said, "We think the interstate character of the relator's business is untouched by these arrangements." Further, "the scale does not cease to be one in interstate commerce because the price is to be

measured by the purchaser's receipts." I think the arrangement in the instant case was a sales contract between the parties, with provisions, somewhat complicated, for regulation and adjustments of the price to be paid for the natural gas. I think the illustration suggested on the brief of counsel for the Natural Gas Company of the modernly common landlord and tenant lease contracts presents an apt analogy, the rental being based on the volume of business and incidental profits of the tenant. Here is a profit sharing compensation plan of fixing compensation, but the independence of the status of the parties is otherwise maintained, and the taxes, or other obligations of the parties are not affected. Another simple illustration: A, a seller, in Dakota, contracts with B; a Tennessee buyer, to sell and ship wheat in such volume as the buyer may require through a given season. The price to be paid A is based on a fixed minimum sum per bushel, plus fifty percent of any excess realized by the buyer from his sales of the wheat. Does this profit sharing arrangement defeat the interstate commerce immunity of the interstate shipment? I think not.

Since, as above indicated, I construe the holding of the majority opinion to be rested on the partnership in profits theory, I confine this brief comment to this theory. However, I have examined the opinion in *Southern Natural Gas Corporation v. Alabama*, and I think the facts so differ from those of the instant case as to distinguish determinatively the cases. In the *Alabama* case, as said in the opinion, "under its contract with the Tennessee Company, which bought for consumption by itself and its subsidiaries in industrial plants, appellant agreed not simply to install metering stations, for measuring the amount of gas delivered, but to establish the requisite service lines running to the described plants in order that the gas might be furnished in a manner suited to the consumers' needs. The gas was supplied through these service lines on the orders received from time to time at the Birmingham office."

The Tennessee Company had a large number of these plants scattered over the State to which the Southern Natural Gas Company delivered gas through service lines which it owned and maintained, upon orders received and

filled from its Birmingham office from time to time. Nearly six hundred miles of its pipes covered the State and carried gas for allotment as required for distribution to these numerous consumer plants. I do not understand that the Memphis Natural Gas Company owned or maintained any service lines, but that the local companies tapped the main pipe line of the Natural Gas Company. The "distinction between the transportation of gas into a State and the furnishing of gas to consumers within the State," to quote the Alabama opinion, appears to have been preserved,—as it was not in that case. Many activities may be carried on within the State without subjecting the interstate transportation to the State taxing power, so long as these activities are merely incidental to the doing of the interstate business. *Ozark Pipe Line Corporation* v. *Monier*, 266 U. S., 555. In that case it was said:

"The business actually carried on by appellant was exclusively in interstate commerce. The maintenance of an office, the purchase of supplies, employment of labor, maintenance and operation of telephone and telegraph lines and automobiles, and appellant's other acts within the state, were all exclusively in furtherance of its interstate business, and the property itself, however extensive or of whatever character, was likewise devoted only to that end. They were the means and instrumentalities by which that business was done and in no proper sense constituted, or contributed to, the doing of a local business."

I do not find that the Memphis Natural Gas Company conducted any business in Tennessee which was not incident to, and in furtherance of, its interstate deliveries. These, briefly stated, being my views, I think the decree of the Chancellor should be affirmed.

CHAMBLISS, *J.*

OFFICE OF CLERK OF THE SUPREME COURT FOR THE MIDDLE DIVISION OF THE STATE OF TENNESSEE

I, David S. Lansden, Clerk of said Court, do hereby certify that the foregoing is a true, perfect, and complete copy of the opinion of said Court, pronounced at its De-

cember term, 1940, in case of Memphis N. Gas Co. against Pope, et al. as appears of record now on file in my office.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of the Court, at office in the Capitol at Nashville, on this, the 17th day of May, 1941.

DAVID S. LANSDEN,
Clerk,

[SEAL]

EXHIBIT "F".

Opinion of Supreme Court of Tennessee on Petition to Rehear.

Copy

Filed June 28, 1941, David S. Lansden, Clerk

DAVIDSON COUNTY EQUITY

MEMPHIS NATURAL GAS COMPANY

v.

LEWIS S. POPE, ET AL.

MEMORANDUM ON PETITION TO REHEAR

The claim of constitutional right under Art. 1, Sec. 8, Clause 3 of the Federal Constitution was presented in the original bill of complainant and in briefs and argument. In refusing to sustain the bill and in holding that the business of complainant, furnishing gas in a joint undertaking with the distributing corporation, and in its business relationship as a whole was intrastate, obviously the claim of federally protected right was decided adversely to complainant.

The point now raised that some of the tax is based upon net earnings derived from sales of gas to Memphis Power & Light Company for use as fuel in its electric generating station and some from sale of gas to West Tennessee Power & Light Company for distribution by it and could not be a part of the earnings from the joint adventure with Memphis Power & Light Company in furnishing gas to the

public in Memphis and vicinity, and hence should be excluded from the tax on the theory of the majority opinion, is not discussed in the opinion. However, that point was apparent and was fully in mind. Though not stated in the opinion, our thought was—and is now—that complainant has not segregated any earnings so far as its brief and argument shows, and is not in the petition. It is not pointed out that there are any net earnings derived from the two sources mentioned. We failed to find in the proof and now fail to find any showing that the asserted tax claim sought to be enjoined contains any net profit from sources other than the vastly major operations, furnishing gas through Memphis Power & Light Company in complainant's intrastate business in Tennessee. Hence that point was not mentioned in the written opinion and we went no further to consider whether such possible earnings from the sale of power house gas and the West Tennessee gas were interstate or intrastate in character.

This suit is to enjoin collection of taxes. If it be true that there are some profits that might be ascribed to purely interstate commerce, such earnings should have been set out separately with proper definiteness of averment in the bill and then supported by proof and pointed out in brief in order to obtain the injunction. This has not been done.

It seems that though complainant might possibly have presented the question of elimination of some part of the profits outside of this joint business with Memphis Power & Light Company it has not done so, but has rested its case upon its much urged contention that *all* of its business was interstate in character.

The point that we have failed to eliminate the net earnings from business done in transporting the oil from the fields in Louisiana to Tennessee, is not well taken for this transportation is not interstate. This transportation to Tennessee is part of one whole scheme of business and cannot be separated from the distribution in Tennessee. Also, there is no basis pointed out by counsel whereby such a calculation can be made by the court.

We have not failed to give to the evidence by witnesses and other documents their proper consideration in construing the whole scheme and relationship from which the con-

clusion was reached that complainant is not engaged in interstate commerce.

All matters set up in the petition to rehear were fully considered by the court. The various opinions and authorities cited by petitioner were considered carefully. We see nothing in the petition to rehear that was overlooked in our former study of the case. We did not fail to give proper weight to the various federal authorities, though only a few were cited in the opinion. This case is different from any other in its facts, and many of the cases only afforded limited criteria in aid of a proper conclusion here.

Therefore we find no merit in the petition to rehear and it is Denied.

Mr. Justice Chambliss adheres to his original opinion in favor on complainant.

FRANK T. FANCHER,
Special Judge.

OFFICE OF CLERK OF THE SUPREME COURT FOR THE MIDDLE DIVISION OF THE STATE OF TENNESSEE

I, David S. Lansden, Clerk of said Court, do hereby certify that the foregoing is a true, perfect, and complete copy of the Opinion of said Court, pronounced at its December term, 1940, in case of Memphis Nat. Gas Co. against Lewis S. Pope, et al., as appears of record now on file in my office.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of the Court, at office in the Capitol at Nashville, on this, the 28th day of June, 1941.

(Signed) DAVID S. LANSDEN, *Clerk.*

(Seal) By ..... D. C.